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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-263
	)	
Consumer Protection and Customer Service	)	

REPLY COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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List A B C D E

TABLE OF CONTENTS

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The National Cable Television Association, Inc. ("NCTA") hereby submits its reply comments in response to various comments filed pursuant to the Commission's December 11, 1992 Notice of Proposed Rulemaking, FCC 92-541 ("NPRM") in this proceeding.

SUMMARY OF COMMENTS

In its initial Comments, NCTA explained that its Customer Service Standards, as annotated, are a suitable model for standards that the FCC must adopt under the 1992 Cable Act. The NCTA standards may be used by a cable operator to improve customer satisfaction, while providing the flexibility that Congress desired in the FCC standards to allow for variations in system demographics and economics.

The standards proposed by several municipal commenters lack the flexibility that Congress intended. A rigid set of

nationwide standards would not work for many systems, and would in fact undermine the delivery of efficient cable television service in many communities. The comments of these franchising authorities are silent as to the costs they would impose, and provide strong evidence in support of NCTA's concern that franchising authorities tend to ignore the costs of their cable television "wish lists." Other comments support NCTA's conclusion that a negotiated customer service agreement offers the best vehicle to establish standards that directly serve the needs of the community without imposing undue pressure on subscriber rates and services.

NCTA's Comments explain that Section 8 of the 1992 Cable Act does not permit federal customer service standards to be self-executing. The local franchising authority must take affirmative action to adopt and tailor the federal standards for the local community. Although several municipal commenters argue that the FCC's standards should be applicable nationwide without further action on the part of the franchising authority, nothing in the 1992 Cable Act supports this position. Many municipalities are satisfied with the current level of customer service, and all negotiated cable television franchise agreements represent a careful balancing of community needs and interests against costs. Congress recognized that uniformity in customer service standards would be unwise, and the Commission should reject these proposals in favor of standards that recognize the differences in each cable television system.

NCTA's initial comments examined those portions of Section 8 which permit state and local authorities to enact customer service and consumer protection measures, and explained that these provisions are consistent with the rest of the statute only if they codify the power to pass laws of general applicability. Franchising authorities do not have unlimited power to impose customer service standards on a cable operator, particularly standards that exceed the FCC's. The 1992 Cable Act permits a cable operator to "fulfill" its customer service obligations under the FCC standards, and requires the agreement of a cable operator to any standards that exceed the FCC model. Moreover, the statutory procedures and standards for renewal of a cable television franchise under Section 626 of the Cable Act tie the imposition of customer service standards to the renewal process. Any other interpretation ignores these statutory restrictions on the power of local governments to impose customer service requirements on a cable operator, and would gut the renewal standards, which require that franchise requirements be justified by cost.

The FCC standards are not a national minimum level of service. Because the statute is intended to address customer satisfaction, it would be senseless to impose costly standards on cable operators and subscribers in communities that are satisfied with the existing level of service. The variety of demographic, economic and physical variation in cable television systems, as

recognized by Congress, requires the flexibility to allow a franchising authority and cable operator to agree to standards less stringent than the FCC's.

Finally, NCTA reasserts that any payments by cable operators for violation of customer service standards should be limited to compensation reasonably related to a loss of service or other harm to a subscriber. Cable operators should also be entitled to minimum notice and an opportunity to cure any claimed violations to encourage self-monitoring and correction.

I. THE ANNOTATED NCTA STANDARDS ARE AN APPROPRIATE MODEL FOR THE FCC STANDARDS

The NCTA standards, as annotated in NCTA's initial Comments, provide an appropriate model for the FCC standards. The Standards provide a solid base for satisfactory customer service, yet are drafted with the flexibility required both by the statute and the practical limitations of each cable television system.

The Comments of the National Association of Telecommunications Officers and Advisers, et al. ("NATOA") and the Attorneys General of Pennsylvania, Massachusetts, New York, Ohio and Texas ("Pennsylvania") criticize the NCTA model standards as being insufficiently demanding. NATOA at 20-21; Pennsylvania at 6. NATOA goes so far as to declare that "Congress noted [this] in the legislative history of the 1992 Act." NATOA at 20-21. This is entirely incorrect. The House Report of the bill from which the customer service provision was taken

states, without qualification, that "[t]he industry's voluntary standards represent a welcome initiative, which the Commission may use [as] a benchmark in establishing customer service standards." House Report at 105.

Other standards proposed by the municipal commenters simply would not accommodate the wide variety of demographics, system economics, and subscriber interests. For example, the City of Miami Beach ("Miami Beach") believes all cable operators must make available qualified customer service representatives on a 24-hour, 365-day per year basis.[1/] Miami Beach at 4. Yet many smaller systems could not afford the additional staffing costs with their available subscriber base. NATOA would impose a host of "self-executing" rigid standards nationwide, such as:

- all systems must maintain sufficient customer service representatives to staff offices "at least 50 hours per week, with at least 9 hours per weekday and 5 hours per Saturday," regardless of cost, conventional local office hours, or the staffing and office standards followed by local businesses;
- all systems must maintain a "state-of-the-art telephone system," regardless of cost, the ability to recover that cost or the suitability of existing service;
- all systems must correct all service outages "in no event later than 12 hours after the

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1/ Miami Beach would allow an operator to use an answering service "if and only if" the service personnel were trained, had current information on service and outages, and could schedule repairs. Miami Beach at 4 n. 4. Such qualifications eliminate virtually all answering services as alternatives to in-house staffing.

company is notified," regardless of cause, cost, staffing levels, system size, or price of the underlying service;

- o 30 days' advance notice to franchising authority and subscribers "before any programming or rate change," regardless of whether the programming is in addition to all existing programming, regardless of whether the programming is pay-per-view (which sometimes changes price on a daily basis), and regardless of whether the rate change involves a discount or promotion beneficial to subscribers; and

- o a national limit on late fees, although most states currently regulate this as a matter of consumer protection.

These are just a few of the many examples provided by NATOA but the point is clear: an inflexible set of national minimum standards such as these could jeopardize service in many communities, and seriously threaten the ability of many cable operators to make a reasonable profit in others. The tremendous cost of implementing customer service requirements, detailed in NCTA's initial Comments, precludes the adoption of such inflexible requirements. The NCTA's model standards, as annotated, provide an appropriate model. Furthermore, the revisions suggested by Continental Cablevision, Inc. are consistent with the NCTA guidelines and, like NCTA's annotations, would clarify some of the NCTA standards for adoption into federal guidelines.

The comments of municipal interests reinforce the concerns explained in NCTA's Comments: the experience of the cable industry to date has been that franchising authorities which impose additional requirements without the input of the cable

operator tend to ignore the resulting costs. As evidence of this trend, the comments of NATOA, the Municipal Franchising Authorities ("Middletown"), West Michigan Communities ("West Michigan"), National Telephone Cooperative Association, the City of Kalamazoo ("Kalamazoo"), Pennsylvania, MGB Associates, Inc. ("MGB"), Miami Beach, and Northwest Municipal Cable Council ("Illinois Council"), are uniformly devoid of reference to the costs that would result from their proposals, or the additional burden on subscribers resulting from such costs.

Indeed, comments filed by Miami Beach underscore the level of misunderstanding of the cable television business in some municipalities. Miami Beach includes "bad reception", "overcharges" and "rate increases" as examples of complaints about customer service it has received. Miami Beach at 1. Yet "reception" is a matter governed by the Commission's preemptive technical standards, and "overcharges and rate increases" are aspects governed by the rate regulation provisions of the Cable Act.[2/] None of the municipal comments make the slightest effort to fashion a scheme for the recovery of the extraordinary service costs they would impose. Instead, they merely ratchet up demands and compare cable disparagingly to public utilities, whose regulatory regimes have virtually assured recovery of expenses for

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2/ "Overcharges" might also be subject to state and local consumer protection laws of general applicability such as fraudulent billing statutes.

more than twice as many employees per line as cable has per subscriber.

As NCTA explains in its opening comments, a negotiated agreement as to customer service, carefully thought through by franchisor and franchisee, is the best solution. The comments of the Illinois Council are testimony. The Illinois Council reports that the customer service standards to which the local operator of a 68,000 subscriber system agreed have resulted in a dramatic decline in subscriber complaints, and reports that "[e]veryone won." Only through the active participation of both the franchising authority and cable operator can the customer service standards be crafted to fit the needs of that particular community and to avoid the imposition of costs to meet standards for which there is no demonstrated need, or when the marginal anticipated benefit is not justified. As explained in detail in NCTA's comments and in Section III below, the Commission should recognize that franchising authorities have no power under the 1992 Cable Act to unilaterally impose or exceed the FCC customer service standards.

II. LOCAL FRANCHISING AUTHORITIES MUST AFFIRMATIVELY ADOPT THE FCC'S STANDARDS

In its initial Comments, NCTA explained that the statutory language and policies behind Section 8 require local adoption (with necessary modification) and precluded self-executing federal standards.

Several municipal commenters, however, suggest that the FCC's customer service standards should apply to all cable television systems without further action by the franchising authority. There is nothing in Section 8 of the 1992 Cable Act to support this interpretation. Such an approach would create an unreasonable imposition on those municipalities which are content with their local cable operator's customer service, and would unreasonably penalize those operators who have devoted extensive resources to create a high level of customer satisfaction. Automatic application of the FCC's customer service standards to every cable system would also disrupt negotiated franchise agreements, which are the result of a careful balancing of the needs and interests of the community against the costs of meeting those needs and interests.

The municipal commenters argue that a mandatory national standard has the benefit of "uniformity." See, e.g., NATOA at 9. NATOA seeks to impose 30 categories of inflexible requirements on all cable systems, regardless of size, economics, or existing subscriber and community satisfaction. Uniformity, however, is the exact opposite of what Congress desired in customer service standards. Congress recognized the need for flexibility in these standards, not rigidity. Even the comments of the New York State Commission of Cable Television ("NYCC") admit that "it is virtually impossible to craft a set of standards which would serve the needs of each and every community throughout the nation." NYCC at 8 ¶ 12.

The comments of NATOA, Pennsylvania, and Middletown recognize the impracticality of one national standard, and propose to temper their national standards through various waiver processes. These proposals, however, rest on the premise that one set of national standards will work for the majority of cable television systems, and that deviations will be the exception. In fact, given the vast diversity in the demographics, technical configurations, economics, and geographical areas covered by cable television systems throughout the country, systems using the national standards without modification would be the exception, and waivers would be routinely needed. Standards tailored to each community by the franchising authority and operator, as proposed in NCTA's Comments, directly promote the intent of Congress that customer service standards meet the needs of each community without unnecessarily creating pressure on subscriber rates and services.

NCTA's standards recognize that it may be impractical for some systems with less than 10,000 subscribers to purchase certain telephone measuring equipment. Various municipal commenters would allow waivers only for cause shown, after the operator has complied with the costly burden of demonstrating need. In fact, in those systems where a waiver is most appropriate, it may be most infeasible for the operator to undertake the effort of applying for and obtaining a waiver (whether from multiple franchising authorities or from the FCC). Small systems owned by

a MSO face economics similar to independently owned small systems. The cost of additional staff and equipment to meet customer service standards must be borne by the same subscriber base as in an independent system.

III. THE 1992 CABLE ACT DOES NOT PERMIT A FRANCHISING AUTHORITY TO UNILATERALLY IMPOSE OR EXCEED FCC STANDARDS

NCTA's initial comments set forth the only interpretation of Section 8 that gives meaning to all words and phrases in the provision, and harmonizes the statute with the existing procedure and standards for franchise renewal under Section 626 of the 1984 Cable Act. Under the law, a franchising authority may not unilaterally impose or exceed FCC customer service standards. Any other interpretation wipes out those provisions which (1) allow a cable operator to "fulfill" its customer service obligations with the FCC standards, (2) prohibit standards in excess of the FCC's without the operator's agreement, and (3) tie customer service firmly to the franchise renewal process, with its attendant protections against "wish-list" franchise requirements that are not justified by community need and by cost.

Several commenters have urged the Commission to interpret Section 632 of the 1992 Cable Act to permit a franchising authority to impose whatever customer service standards it pleases at any time. NATOA at 18-19; NYCC at 3, 7; Communities at 2-5; Middletown at 9. These suggestions are wrong. The statute unambiguously limits the ability of a franchising authority

to impose standards that exceed the FCC's by requiring the agreement of the cable operator. 47 U.S.C. § 552(c)(2). The statute also limits the discretion of a franchising authority to impose standards in excess of the FCC's by declaring that "cable operators may fulfill their customer service requirements" by meeting the Commission's. 47 U.S.C. § 552(b). Those municipal commenters who suggest that a franchising authority has unfettered discretion to unilaterally impose standards that exceed those adopted by the Commission would render these provisions irrelevant, in contravention of fundamental principles of statutory construction.

Similarly, these comments ignore the existing statutory framework for renewal of a cable television franchise. As explained in NCTA's comments, Section 626 of the Cable Act ties customer service standards under a franchise to community needs and interests, taking into account the cost of meeting those needs. Under this provision, a local franchising authority may not unilaterally impose any customer service requirements prior to the expiration of an existing franchise term. The municipal commenters argue that those provisions of Sections 632(a) and 632(c) which preserve the authority of a franchising authority to pass customer service and consumer protection measures somehow confer unlimited discretion on them to impose customer service standards.[3/] But the right to adopt consumer protection trade

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3/ West Michigan and Kalamazoo declare that a franchising authority has unlimited power to impose customer service

[Footnote Continued Next Page]

rules of general applicability does not empower a state to evade these limitations by adopting selective cable customer service regulations.

IV. THE 1992 CABLE ACT PERMITS A FRANCHISING AUTHORITY AND CABLE OPERATOR TO AGREE TO CUSTOMER SERVICE STANDARDS LESS DEMANDING THAN THE FCC'S

Several commenting parties argue that the FCC's standards are to be a national minimum, preempting less stringent standards that may exist nationwide. See, e.g., NATOA at 8 (waiver needed); Pennsylvania at 4-5; Middletown at 6, 10 (waiver needed). Illinois Council agrees with this notion, even though

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[Footnote Continued]

standards at any time, citing Cablevision of Michigan, Inc. v. City of Kalamazoo, No. 4-90-CV-170 (S.D. Mich. December 20, 1990). The opinion is of little value. This was a nonreviewable, nonfinal decision to deny a preliminary injunction against enforcement of a Kalamazoo customer service ordinance. It did not decide the merits of the case. It did not analyze Section 632 of the 1992 Cable Act, which added the requirement that an operator be permitted to fulfill its customer service obligations under FCC standards, and required that the operator "agree" to additional standards. It ignored entirely any Supreme Court interpretion of the Contracts Clause or police power. See, e.g., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (company entitled to rely on legitimate contractual expectation; law imposing new standards violated Contract Clause); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60 (1935) (law changing bond contracts unconstitutional because it impaired "the quality of an acceptable investment for a rational investor"). When a government enacts a law altering its own contract, "complete deference . . . is not appropriate . . . because the [government's] self-interest is at stake." United States Trust Co. v. New Jersey, 431 U.S. 1, 17-23 (1977). The cost of customer service obligations in a franchise agreement could alter dramatically "the quality of an acceptable investment to a rational investor," bringing existing customer service standards in franchises fully within the protection of the Contract Clause.

the standards Illinois Council negotiated with the local cable operator "are actually a little less stringent than the NCTA standards in some respects," and Illinois Council acknowledges that customer service under the negotiated agreement is "a success story." Illinois Council at 2. The lesson is instructive.

In those communities in which a cable operator is satisfying its customer's needs, standards that measure performance are irrelevant. If the franchising authority, cable subscribers, and cable operator are largely satisfied with the level of customer service, the imposition of more demanding standards is unwarranted, and would result only in a waste of resources.

Middletown agrees with NCTA's assessment that customer service standards less demanding that the FCC's must be permitted. As Middletown explains, there exists "a variety of local circumstances, such as impossibility, excessive cost under the circumstances, or reasonableness due to a small number of subscribers. Second, a franchising authority with satisfactory customer service requirements . . . should not have to commit significant resources to retain the status quo or implement standards it believes are unnecessary." Middletown at 6-7. NCTA's proposal for negotiated application of its standards fully satisfies these concerns.

V. ENFORCEMENT PROCEDURES SHOULD BE DESIGNED TO ENCOURAGE COMPLIANCE AND DETER ABUSE

Some of the municipal commenters who urge the Commission to adopt standards with strict provisions for credit to subscribers and/or forfeitures for failure to comply simultaneously argue that the FCC's standards should become binding on a national basis immediately upon adoption. See, e.g., NATOA at 2, 27; NYCC at 6-7 ¶¶8-9; Middletown at 3, 11-13, 17; Pennsylvania at 2, 9. It is patently unfair, and a violation of due process, to hold a cable operator in default of standards immediately upon their issuance, without opportunity for the cable operator to retool personnel and equipment to meet those standards. That these commenters would suggest such a scheme provides further support for NCTA's fear that local franchising authorities may take advantage of "enforcement" mechanisms, in thinly disguised efforts to replenish their treasuries.

NCTA urges that any system of enforcement, beyond compliance, be limited to compensation reasonably related to a loss of service or other harm a subscriber incurs. Per diem penalties, such as the $200 per day fine suggested by Miami Beach, serve no legitimate compensatory purpose, while diverting resources that could instead be used to improve customer services, to purchase programming, and to reduce cost pressure on rates.

Cable operators should, at minimum, have notice and an opportunity to cure any perceived transgressions. This is what the Illinois Council has done with its cable operator. Illinois Council at 4-5.

VI. CONCLUSION

For these reasons, NCTA respectfully requests that the Commission:

1. Adopt the annotated, clarified NCTA standards as the FCC national benchmark;

2. Declare that a franchising authority need not adopt the FCC's standards if it is satisfied with existing customer service;

3. Affirm that a franchising authority may not unilaterally impose or exceed the FCC's customer service standards without the agreement of the cable operator;

4. Affirm that consensual franchise provisions are grandfathered until renewal;

5. Affirm that a franchising authority may agree with the operator to incorporate customer service requirements less stringent that the FCC's standards;

6. Adopt rules limiting the potential for excessive enforcement action, giving operators a right to cure and freedom from punitive remedies; and

7. State that smaller cable systems may be less able to comply with all of the FCC standards, and urge franchising authorities to take into account the size of systems when developing and applying customer service standards.

Respectfully submitted,

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